91-1866

Supreme Court, U.S.
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NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

DANIEL WEISS,

Petitioner,

v.

COMMODITY FUTURES TRADING COMMISSION and THE STATE OF FLORIDA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED FOR REVIEW

WHETHER THE CONTINUED IMPRISONMENT OF A CIVIL CONTEMNOR WHO HAS STEADFASTLY MAINTAINED HIS INABILITY TO COMPLY THROUGHOUT HIS TWO YEAR INCARCERATION CONSTITUTES A PUNITIVE SANCTION IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE CONSTITUTION OF THE UNITED STATES AND THE DECISIONS OF THIS COURT?

PARTIES TO THE PROCEEDINGS BELOW

1. Petitioner, DANIEL WEISS

2. COMMODITY FUTURES TRADING COMMISSION, Plaintiff and Appellee, below.

3. STATE OF FLORIDA; Plaintiff and Appellee, below.

4. Honorable C. Clyde Atkins, United States District Judge, Southern District of Florida.

5. JOEL RUTENBERG, Co-Defendant.

6. WELLINGTON PRECIOUS METALS, INC., Co-Defendant.

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COMMODITY FUTURES TRADING COMMISSION, et al. v. WELLINGTON PRECIOUS METALS, INC., et al., 950 F. 2d 1525 (11th Cir. 1992)

STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction to consider this Petition for Writ of Certiorari pursuant to 28 U.S.C. Section 1254(1) and Rule 17.1(c), Supreme Court Rules.

The decision below of the United States Court of Appeals, Eleventh Circuit, rendered on January 14, 1992 (App. A), decided an important question of federal law which has not been, but should be, settled by this Court. Further, the decision below conflicts with the decisions of this Court and those of other Circuits.

The decision sought to be reviewed is the denial of a Motion to Terminate Sanctions imposed upon a finding of civil contempt, where the contemnor continues to claim that he

is unable to comply with the Order of the trial court, despite a lengthy term of incarceration. This decision has important due process implications, which have previously been recognized by this Court. While this Court's earlier decisions have provided general principles that continue to govern the use of coercive sanctions, the Circuits have differed radically in their interpretation and application of these general principles. There is no clear agreement among the Circuits as to the factors which must be considered in determining when unproductive coercive incarceration loses its original purpose and becomes purely punitive in violation of the contemnor's due process rights. The Petitioner urges that further

direction from this Court is now required, and in its absence future contemnors will continue to suffer the same deprivation of due process that has occurred in this case.

The constitutional provision involved in this case is the Due Process clause of the Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in the time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to give be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S. Const. Amend. V.

The decisions of this Court and other Circuit Courts which conflict with the decision of the Eleventh Circuit below are:

McNeil v. Director, Patuxent Institution, 407 U.S. 245, 92 S.Ct. 2083, 32 L.Ed.2d 719 (1972)

Maggio v. Zeitz, 333 U.S. 56, 68 S.Ct. 401, 92 L.Ed. 476 (1948)

In re. Grand Jury Proceedings (Braun), 600 F.2d 420 (3d Cir. 1976)

Lambert v. State, 545 F.2d 87 (9th Cir. 1976)

STATEMENT OF THE CASE

A. PRELIMINARY STATEMENT

The Petitioner, Appellant/Defendant/Contemnor below, Daniel Weiss, will be referred to as "Weiss." The Respondent, Appellee/Plaintiff below, the Commodity Futures Trading Commission, will be referred to as "the CFTC."

References to the record and supplemental record on appeal in the Eleventh Circuit proceedings will be designated "R" and "SR" respectively, followed by the appropriate volume and page number. Documents contained in the attached Appendix are identified as "App.," followed by an alphabetical designation and page number, where appropriate.

B. COURSE OF PROCEEDINGS, DISPOSITION BELOW AND STATEMENT OF THE FACTS.

On November 14, 1985, the underlying Plaintiff, COMMODITY FUTURES TRADING COMMISSION and the STATE OF FLORIDA, filed a Complaint against Petitioner, DANIEL WEISS, Co-Defendant, JOEL RUTENBERG and WELLINGTON PRECIOUS METALS, INC., seeking an injunction and ancillary relief for alleged violations of the Commodities Exchange Act, Title VII, U.S.C.§6 et. seq. and the corresponding Florida Securities Statutes. After a non-jury trial, the District Court found in favor of the Plaintiffs, and on October 21, 1988, entered a Final Judgment enjoining the Defendants from further violations of law and ordered Petitioner, DANIEL WEISS to disgorge the amount of $2,883,107.00 within ten (10)

days. (R. 10-274)

Approximately one (1) month later, on November 14, 1988, the Court-appointed receiver filed a notice of non-compliance with the Court's Order of Final Judgment and subsequently, on January 27, 1990, the underlying Plaintiffs, COMMODITY FUTURES TRADING COMMISSION and the STATE OF FLORIDA, filed a motion for an Order to Show Cause for civil contempt for DANIEL WEISS' failure to comply with the Court Order of disgorgement. An evidentiary hearing was held on that motion on October 20, 21 and 24, 1989. (R. 27-29). At the contempt hearing Petitioner, DANIEL WEISS testified, produced financial records, and called several witnesses, including his wife, brother, and accountant. The Plaintiffs

did not present any evidence at the hearing but argued factual matters in their post-hearing memorandum.

Essentially, Petitioner produced evidence at the contempt hearing that he was financially unable to satisfy the disgorgement order, as he no longer possessed any of the funds which he received from WELLINGTON or from any current earnings. Petitioner testified that his financial condition had deteriorated over the past years and he was unable to meet everyday living expenses without the assistance of his wife. (R. 27-39). He produced evidence that his current income was not keeping up with his living expenses and he was continuing to experience financial hardship including foreclosure of

his residence. (R. 27-131-134).

Additionally, Petitioner testified and produced evidence of the disposition of approximately $1.35 million dollars in the form of failed investments, expenditures and loans which were no longer collectible. (R. 11-343-8,9).

After considering post-hearing memorandum, on March 14, 1990 the District Court entered an Order granting the Plaintiff's Motion for Civil Contempt against Petitioner, DANIEL WEISS, and ordered that Mr. Weiss pay the sum of $144,455.35 (five percent of the disgorgement ordered) within ten (10) days. (R. 11-343). The order also provided that, if the Petitioner failed to make the payment, the Court would issue a warrant for

his arrest.

In its order finding the Petitioner, DANIEL WEISS in civil contempt of court, the District Court rejected WEISS' contention that he had actually received far less than the $2.8 million dollars in benefits ordered disgorged by the final judgment, relying upon the doctrine of collateral estoppel pointing out that WEISS' counsel had not appealed the Final Judgment. (R. 11-343-3-5).[1]

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[1]The collateral estoppel argument has continued to plague Petitioner throughout the course of the proceedings even until today. During all subsequent District Court proceedings at which time he argued that he never received the money which he was ordered to disgorge, thus being forced to prove a negative in attempting to show his present inability to pay, WEISS has been met with the claim that he is collaterally estopped from making such an argument. Frustrated by the "Catch 22" situation he has found himself in,

In its order holding Petitioner in civil contempt, the District Court also found the Petitioner's evidence of financial hardship "untrustworthy". (R. 11-343-9,10) and concluded that Petitioner had not taken "all reasonable steps," to comply with the disgorgement order, noting that he had not filed suit to recover debts owed to him notwithstanding the fact that many of the debtors did not possess sufficient assets to repay the value of the loans. (R. 11-343-11).

On March 20, 1990, Petitioner filed an

WEISS filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C.§2241, alleging ineffective assistance of counsel in the underlying civil fraud case. The Writ was dismissed by the District Court, pointing out inter alia, that Habeas Corpus relief would not be available to redress claimed ineffective representation by counsel in a civil case.

emergency motion to stay execution of the Court's Order of Civil Contempt (R. 11-349) which was granted, giving Petitioner thirty (30) days to make the payment of $144,155.35. Subsequently, Petitioner filed a second motion to stay the Order on April 19, 1990 which was denied. (R. 12-373, 376). The District Court entered a warrant for Petitioner's arrest on April 24, 1990, upon which the Petitioner surrendered and has remained in custody ever since.

Thereafter, on June 11, 1990 Petitioner filed a Motion for an Order Terminating the Order of Civil Contempt entered on March 14, 1990, arguing that Petitioner was unable to satisfy the Court's Order of Payment and that the continued incarceration of Petitioner had

become "purely punitive". The District Court denied Petitioner's Motion to Terminate the Order of Contempt on July 24, 1990 (SR-2-409), finding that "the coercive sanction might yet produce its intended result". The Court further stated in its order:

> "If WEISS wants to be released from prison, he will have to take concrete steps to satisfy his obligations. Specifically, he will have to pay over five percent of the Final Judgment or he will have to propose to the Court and then implement an equally acceptable alternative. WEISS will not, however, be permitted to secure his release through promises, meritless arguments and other verbal representations."

On August 24, 1990, Petitioner filed a timely Notice of Appeal to the Eleventh Circuit Court of Appeals on the District Court's Order Denying Motion to Terminate

Order of Contempt. (SR-2-412).

During the pendancy of the Appeal before the Eleventh Circuit, Petitioner filed a Second Motion to Terminate Order of Civil Contempt on August 20, 1991. On October 23, 1991 the District Court denied Petitioner's Motion to Terminate Order of Civil Contempt, adopting in full the Report and Recommendation of the Magistrate entered on October 4, 1991. In that Report and Recommendation, the Magistrate found that Petitioner had failed to meet "any of the specific requirements set by this Court as conditions precedent to the termination of his civil contempt". Neither the Report and Recommendation, nor the Order adopting it by the District Court, dealt with the argument that the incarceration by this

point in time had become purely punitive. The Magistrate's report also noted that Petitioner was subject to a concurrent state criminal sentence which he was presently serving while incarcerated under the civil contempt order.[2] In his objections to the Report and Recommendation of the Magistrate, Petitioner noted that the federal incarceration on the civil contempt order, prevented him from earning the good time allowances he could receive if he were in custody of the state authorities, thereby denying him the opportunity to already secure his release from state prison, if he were in state custody.

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[2]Under the Magistrate's analysis, the presence of the concurrent state sentence would destroy any coercive effect of the incarceration for contempt since Weiss would not be released, even if he complied.

On January 10, 1992 Petitioner filed his Motion to Renew his Motion to Terminate the Order of Civil Contempt with the District Court. This Motion is still pending.

On January 14, 1992, the United States Court of Appeals for the Eleventh Circuit, filed its decision affirming the District Court's finding of civil contempt and its denial of Petitioner's Motion to Terminate the Contempt Order. A Petition for Rehearing to the Eleventh Circuit filed on February 3, 1992 was denied by the Court on February 20, 1992.

ARGUMENT AND AUTHORITIES

THE CONTINUED IMPRISONMENT OF A CIVIL CONTEMNOR WHO HAS STEADFASTLY MAINTAINED HIS INABILITY TO COMPLY THROUGHOUT HIS TWO YEAR INCARCERATION CONSTITUTES A PUNITIVE SANCTION IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE CONSTITUTION OF THE UNITED STATES AND THE DECISIONS OF THIS COURT.

In a series of early decisions, this Court set out the general principles that govern the imposition of coercive sanctions to compel compliance with lawful court orders, while avoiding violations of the contemnor's due process rights. McNeil v. Director, Patuxent Institution, 407 U.S. 245, 92 S.Ct. 2083, 32 L.Ed.2d 719 (1972); Maggio v. Zeitz, 333 U.S. 56, 68 S.Ct. 401, 92 L.Ed. 476 (1948). These decisions stand for the basic principle that when sanctions for civil contempt fail to produce compliance, they lose their coercive effect and become purely punitive.

Maggio involved a bankruptcy turnover order, similar to the disgorgement order entered in Weiss' case and in Maggio, as here,

the Petitioner claimed that his noncompliance was the result of an inability to comply, rather than willful disobedience. This Court recognized that if, after a reasonable period of incarceration, the contemnor fails to produce the money or property which is the subject of the order, the contemnor's explanation that he cannot obey must be credited, and he must be released. Further incarceration would have no reasonable likelihood of producing compliance and would only impermissibly punish the contemnor for his inability to comply, in violation of the principles of due process which require that the sanctions bear a reasonable relationship to their coercive purpose. Maggio, 333 U.S. at 76; see also, Oriel v. Russell, 278 U.S.

358, 366, 49 S.Ct. 173, 73 L.Ed. 419 (1929). In Maggio, this Court vacated the finding of civil contempt two years and seven months after it had been entered.

This Court has also recognized that continued incarceration can violate the contemnor's Due Process rights even when the contempt stems from a refusal, rather than an inability, to obey the order of the court. In McNeil v. Director, Patuxent Institution, 407 U.S. 245, 92 S.Ct. 2083, 32 L.Ed.2d 719 (1972), the petitioner had been ordered by the trial court to submit to a psychological evaluation. He resisted the evaluation throughout his five year sentence for his underlying criminal conviction, and continued to refuse to comply during the additional year

that he spent in prison for refusing to cooperate with the order committing him for psychological examination. This Court concluded that on these facts, there was no basis for finding that he would ever submit to the examination even if he was imprisoned indefinitely. The Court concluded that the sanctions had outlived whatever coercive effect that may have once had and ordered McNeil discharged. Id. at 250, 92 S.Ct. at 2087.

Applying these principles, there is some identifiable point in time when Weiss' continued incarceration can be deemed to have crossed the line between coercive and punitive sanctions, regardless of whether Weiss has been truthful all along in his assertions that

he cannot comply, or whether, as the District Court concluded, Weiss has merely been disobedient. While the trial court must be allowed a certain amount of discretion in making the determination in individual cases as to when this line is crossed, due process requires that once it can be reasonably determined that further sanctions will have no coercive effect, it would be an abuse of discretion to deny a Motion to Terminate.

In its opinion below, the Eleventh Circuit recognized that the court is required to make an individualized determination whether, on the facts before it, there exists a realistic possibility that the contemnor will comply if the sanctions are continued. (App.A-12); See also, Maggio, 333 U.S. at 76

("The credibility of his denial [of his ability to comply] is to be weighed in the light of his present circumstances."); In re Grand Jury Proceedings (Howald), 877 F.2d 849, 850 (11th Cir. 1989); Simkin v. United States, 715 F.2d 34, 37 (2d Cir. 1983). However, on the face of the District Court's Order denying Weiss' Motion to Terminate, it is apparent that no such individualized consideration of the facts occurred here.

Despite the District Court's statement that it had made a "careful review" of the case, the only finding of fact included in the Order is that as of the date of the Order, Weiss had still not complied. (App. B at p.3) That finding does not satisfy the individualized determination required by

Maggio. In Maggio, this Court made it clear that the fact of noncompliance standing alone is an insufficient basis upon which to order continued incarceration:

> The trial court is obliged to weigh not merely the two facts, that a[n] ... order has issued and that it has not been obeyed, but all the evidence properly before it in the contempt proceeding in determining whether or not there is actually a present ability to comply and whether failure so to do constitutes deliberate defiance which a jail term will break.

Maggio, 333 U.S. at 76. While the Court was addressing the standard to be used in determining the initial appropriateness of imprisonment, the Maggio opinion explained that the same rule applies for a motion to

terminate. Id. at 77.[3]

Further, the District Court appears to

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[3] The District Court did apply a "cost-benefit" analysis, but did not base this analysis on any factual findings. Without reference to any evidence, the Court concluded that Weiss' continued failure to comply "means simply that Weiss deems the detriments of incarceration [are] outweighed by the concomitant benefits of holding onto his ill-gotten Wellington monies." (App. B-5). Despite the lack of reference to any specific facts, it is clear that the District Court used the wrong figure in its "benefit" determination. Weiss was not imprisoned for his failure to turn over his "ill-gotten monies," he was sanctioned for his noncompliance with the amended requirement that he return 5% of the final judgment, or $144,155.35. On the facts of this case, the true "cost-benefit analysis" should be stated as whether, after having served two years in prison, it is reasonable that Weiss would still deem that the benefit of retaining $144,155.35 outweighs the hardship of continued imprisonment, where, if he in fact still has this money, he has been unable to use it to satisfy the tax lien on his home or prevent the numerous foreclosure actions that have been instituted in the recent past. (R.27-45,131-134).

have rejected this Court's holding that the credibility of a contemnor's denial of his ability to comply is to be weighed in the light of his current circumstances, and is to be given more credit when the contemnor continues to plead inability after he has been subjected to a period of imprisonment. Maggio, 333 U.S. at 76. Instead, the District Court characterized as "meritless argument" Weiss' request, in reliance on the Maggio decision, that the initial finding on his current ability to comply be reconsidered in light of his incarceration. (App. B-6). The District Court stated that it had listened to Weiss' explanation that he was unable to comply at the time that sanctions were initially imposed and had already rejected

that argument. (App. B-3,4) The District Court warned that if Weiss wanted to be released from prison, he would have to comply with the disgorgement order, thereby appearing to foreclose the possibility that the Court could ever be persuaded by any period of imprisonment, no matter how lengthy. (App. B-6)

While Weiss is unable to find any published case in which a court took the same intransigent position as the one set out in the District Court's denial of his Motion for Termination, there has been little agreement among the Circuits as to what factors need to be considered in deciding what to do about the fact that a period of imprisonment has thus far failed to induce compliance. In Lambert

v. State, 545 F.2d 87, 90 (9th Cir. 1976)(J. Kilkenny, concurring and dissenting), one Circuit Court judge attempted to send a message to future contemnors that a decision by this Court was needed on the issue of the nature of the factual determination that must be made and the procedure to be followed. But since the Lambert decision, no clear direction has been provided by this Court.

In McNeil, this Court looked to legislative clues to the permissible length of commitment. 407 U.S. at 250, 92 S.Ct. at 2087 (Noting that a state statute limited the time for conducting a psychological exam to six months). The Ninth Circuit has looked to the maximum sentence that could be imposed if the disobedience had been considered under the

criminal contempt statutes for guidance in determining the permissible limits of coercive incarceration. Lambert, 545 F.2d at 91; see also, Sigety v. Abrams, 632 F.2d 969, 976 n. 6 (2d Cir. 1980).

Here, the Federal Criminal Contempt Statute, 18 U.S.C. Section 402, would have freed Weiss after six months, had the District Court sought instead to punish him for his noncompliance.

While Congress has not enacted any laws to limit the period of incarceration for civil contempt in general, it has placed limitations on sentences imposed for the refusal to comply with certain types of orders. By special act, Congress has provided that a parent who refuses to disclose the location of her child

in a custody case cannot be held in coercive confinement for more than one year.

Under 28 U.S.C. Section 1826(a)(2), a recalcitrant grand jury witness cannot be detained for more than 18 months on the basis of his continued refusal to testify.[4] Congress had originally also considered a three year cap on imprisonment, but a majority of the lawmakers concluded that 18 months would be sufficient to demonstrate that the witness would never agree to testify, and that anything beyond that, even with a three year

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[4]While Congress set the upper limit on sanctions for an uncooperative grand jury witness, courts have found that in some cases continued imprisonment may cease to be coercive before this statutory limit has been reached. Sanchez v. United States, 725 F.2d 29, 31 (2d Cir. 1984).

cap, would be purely punitive. Hearings Before Subcommittee No. 5 of the House Committee of the Judiciary on S. 30 and Other Proposals, 91 Cong, 2d Sess. 99-100 (1970), quoted in, In re. Grand Jury Investigation (Braun), 600 F.2d 420, 426-27 (3d Cir. 1979).

Using these legislative determinations for guidance, a period of coercive confinement which exceeds the six to eighteen month range should be carefully scrutinized. At the time of filing this Petition, Weiss has been imprisoned for two years.

Unlike Congress, the Eleventh Circuit could not give any estimate of when imprisonment would cease to have any coercive

effect in this case.[5] Quoting United States ex rel. Thom v. Jenkins, 760 F.2d 736, 740 (7th Cir. 1985), the only prediction that the Court would make regarding Weiss' future was that "many months or perhaps even several years may pass before it becomes necessary to conclude that incarceration will no longer serve the purpose of the civil contempt

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[5] Weiss realizes that unlike a defendant in a criminal contempt case, he is not required to be given a determinate sentence. However, he contends that the District and Circuit Courts should have some set of factors that they use to determine when coercive incarceration no longer serves its intended purpose. If the Courts cannot provide an explanation of the rational basis for their decision that Weiss' sanctions have not yet reached that point, it appears that they have abused their discretion.

order." (App. A-15).[6] The petitioner in Thom had been imprisoned for less than one year at the time his appeal was decided. 760 F.2d at 738. To a man who has already served two years due to his failure (or inability) to comply, such language sounds more like a threat than an "individualized determination."

The Eleventh Circuit relied upon Simkin v. United States, 715 F.2d 34, 38 (2d Cir. 1983) to hold that the trial court has "virtually unreviewable discretion" in determining whether a civil contempt sanction has become punitive. But even a cursory reading of Simkin discloses that the Court was

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[6]The Eleventh Circuit appears to be substituting an endurance test for the "balancing test" required by this Court in Maggio, 333 U.S. at 76-77.

addressing the standard of review for decisions involving the termination of imprisonment for reluctant grand jury witnesses within the 18 month period permitted by 28 U.S.C. Section 1826(a)(2). This standard is inappropriate where there is no such maximum cap on incarceration and the contemnor may be subjected to a limitless period of "coercive" incarceration. It is clear that Chief Justice Taft had a standard of review that was substantially more meaningful than the "virtually unreviewable" standard applied by the Eleventh Circuit, when he described the respective duties of the trial and appellate courts:

> There is a possibility, of course, of error and hardship; but the conscience of judges in weighing the evidence under a clear perception of

> the consequences, together with the opportunity of appeal and review, if properly taken, will restrain the courts from recklessness of bankrupt's [contemnor's] rights on the one hand and prevent the bankrupt [contemnor] from flouting the law on the other....

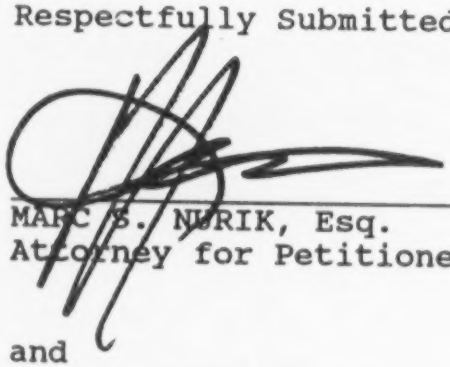
Oriel v. Russell, 278 U.S. 358, 364, 49 S.Ct. 173, 73 L.Ed. 419 (1929). Due to the continued disagreement among the Circuits, it is now time for this Court to provide a clear statement on how trial courts are to perform the function of weighing the evidence, as envisioned by Chief Justice Taft back in 1929.

CONCLUSION

WHEREFORE, Petitioner DANIEL WEISS respectfully requests that this Honorable Court grant his Petition for Writ of Certiorari and review the both the standards used in reaching the decision on his Motion to

Terminate, reverse the decision denying his Motion, and order the termination of the sanctions imposed by the District Court.

Respectfully Submitted,



MARC S. NURIK, Esq.
Attorney for Petitioner

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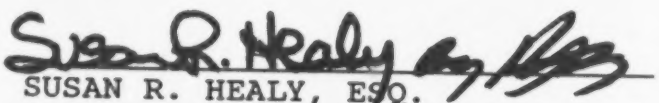

SUSAN R. HEALY, ESQ.
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a true and correct copy of the foregoing has been served by U.S. Mail to GARY L. PRINTY, ASST. GENERAL COUNSEL, DEPARTMENT OF BANKING AND FINANCE, THE LEGAL SECTION, Suite 1302, The Capitol Building, Tallahassee, FL 32399-0350; VICTOR L. REID, ESQ., OFFICE OF THE GENERAL COUNSEL AND DENNIS O'KEEFE, ESQ., COMMODITY FUTURES TRADING COMMISSION, 2033 "K" STREET, N.W., WASHINGTON, D.C. 20581, this 15th day of May, 1992.

MARC S. NURIK
Attorney for Petitioner

APPENDIX "A"

COMMODITY FUTURES TRADING COMMISSION and the State of Florida, Plaintiff-Appellees, v. WELLINGTON PRECIOUS METALS, INC., et al., Defendants, Daniel Weiss, Defendant-Appellant. 11th Circuit. Case No.: 90-5726. January 14, 1992. Appeal from the U.S. District Court for the Southern District of Florida. C. Clyde Atkins, Judge.

Before FAY and HATCHETT, Circuit Judges and HILL, Senior Circuit Judge.

PER CURIAM:

Appellant, Daniel Weiss, was found guilty, in a civil proceeding, of fraudulent sales of

securities through a rather large "boiler room" operation. As a result of that trial, he was ordered to disgorge $2.8 million. Upon failure to make any payments whatsoever, Weiss was found in contempt and ordered to pay five percent of the sum or face incarceration. Again Weiss paid nothing and was confined. Several months later, Weiss filed a motion with district court to terminate the contempt order and release him from prison. The district court denied this motion and Weiss remains incarcerated. For the reasons that follow, we AFFIRM the district court's finding of civil contempt and its denial of Weiss's motion to terminate the contempt order.

I.

On October 21, 1988, following a bench trial,

Weiss was ordered by the district court to disgorge within ten days $2,883,107.00 for fraudulently selling off-exchange futures contracts to the public, in violation of Sections 4a and 4b(A) of the Commodity Exchange Act, and for operating a "boiler room" and fraudulently selling investments to the public, in violation of various sections of the Florida Securities and Investor Protection Act. The $2.8 million figure represented Weiss' share of the illegal "salaries, draws, fees, and commissions" generated by the fraud. (R10:274 at 6). Weiss did not appeal this order.

Almost exactly one year after the court entered its order to disgorge, Weiss still had

not shelled out a penny. On a motion brought by plaintiffs-appellees, Commodity Futures Trading Commission (CFTC) and the State of Florida, Senior District Judge C. Clyde Atkins held a hearing to determine whether Weiss's failure to pay was grounds for contempt. At the hearing, Weiss acknowledged that he had failed to comply with the court's disgorgement order but argued that his noncompliance should be excused because he was financially unable to meet the terms of the order. Weiss claimed that all money he made from his fraudulent activities was gone. Weiss's argument to the court was twofold. First, Weiss attempted to show that the $2.8 million disgorgement figure in the court order was incorrect. Weiss argued that he in fact made only approximately

$1.4 million from his illegal activities. Second, Weiss accounted for the $1.4 million in the following ways:

--$150,000 invested in an art gallery called "Ventures," which went bankrupt;

--$225,000 invested in a bakery business called "Mr. Knish", which went bankrupt;

--$385,000 loaned to American Luxury Kitchens, for which Weiss received no collateral. The business went bankrupt and Weiss has not received a penny on his loan;

--$50,000 loaned to his brother Marcus Weiss, for which Weiss has received repayment of only $2,000;

--$60,000 loaned to his son Stuart Weiss, who has not repaid him;

--$150,000 loaned to his friends Sybil and Lawrence Austin, who have not repaid him;

--$130,000 loaned to Intrepid Ventures, Inc. a real estate investment venture which went bankrupt;

--$30,000 for a Maserati automobile which was repossessed;

--$24,000 for a Jaguar automobile which was given away as a present;

--$23,000 for a Peugeot automobile which was also given away;

--$42,000 for a boat which was claimed by the Internal Revenue Service (IRS);

--$40,000 for a downpayment on a house which was resold without recoupment of the downpayment; and

--$40,000 for a horse which was put to sleep.

Weiss admitted that he did not institute judicial proceedings against his debtors and that his attempts to secure repayment consisted only of contacting the debtors. Weiss further testified that his only remaining asset was his home, with an equity value of $60,000. However, he claimed that he was unable to sell the house because of an IRS tax lien. Weiss also explained that he did not seek salaried employment during 1989 and that he and his wife were living off of her salary and student loans. Plaintiffs presented no evidence at the hearing to rebut Weiss's evidence or to otherwise prove that

Weiss was in fact able to meet the terms of the disgorgement order.

On March 14, 1990, the district court issued an order finding Weiss in civil contempt for failure to comply with the October 21, 1988 disgorgement order. Judge Atkins rejected Weiss's attempt to reargue the $2.8 million figure in the disgorgement order and found unconvincing Weiss's explanation for what happened to the $1.4 million he admitted to receiving from his part in the commodities investment fraud. Judge Atkins ordered Weiss, under penalty of arrest and imprisonment, to pay five percent of the total amount due under the disgorgement order, or $144,155.35, no later than March 22, 1990. Weiss did not meet

the March 22, 1990 deadline. Instead, he filed an emergency motion to stay execution of the contempt order and received an additional thirty days in which to make his $144,155.35 payment. Once again, Weiss failed to meet the deadline and requested another extension. This time, however, his request was denied and on April 24, 1990, Weiss was incarcerated.

After several months in prison, Weiss filed a motion asking the district court to terminate its March 14, 1990 order of civil contempt claiming that the time he had spent in jail was proof that he did not have the funds required to pay the $144,155.35 due under that order. Weiss's motion was denied on July 24, 1990, and Weiss remains incarcerated to this

date.

Weiss appeals the district court's contempt order of March 14, 1990, and its July 24, 1990 order denying his request to terminate the contempt order.

II.

We must consider the following issues on appeal: (1) whether the district court erred in refusing to allow Weiss to reargue the amount he was required to pay in the underlying disgorgement order; (2) whether the district court was clearly erroneous in finding that Weiss failed to prove that he was unable to comply with the district court's disgorgement order; and (3) whether the civil

contempt order of March 14, 1990 continues to be coercive.

* * *

C. Continued Incarceration

Weiss's final argument to this court is that the district court,m in its order of July 24, 1990,· erred in its determination that the civil contempt order had not lost its coercive effect. Civil contempt sanctions, are, of course, employed by the courts to secure compliance with their orders. See In re Grand Jury Investigation, 600 F.2d 420, 422 (3d Cir. 1979) ("Embedded in Anglo-American law is the inherent power of the judiciary to coerce obedience to its orders by summarily holding a recalcitrant person ... in civil contempt, and then imprisoning him until he complies.")

However, when civil contempt sanctions lose their coercive effect, they become punitive and violate the contemnor's due process rights. In re: Grand Jury Proceedings (Howald), 877 F.2d 849, 850 (11th Cir. 1989). Therefore, when considering a motion to terminate a civil contempt order, "the district court must make an individualized determination as to whether there exists a realistic possibility that the contemnor will (comply)." Id.; see also Simkin v. United States, 715 F.2d 34, 37 (2d Cir. 1983) ("As long as the judge is satisfied that the coercive sanction might yet produce its intended result, the confinement may continue. but if the judge is persuaded ... that the contempt power has ceased to have a coercive

effect, the civil contempt remedy should be ended."). The burden is on the contemnor to prove that "no such realistic possibility exists," Simkin, 715 F.2d at 37, and on review, the findings of the district court are subject to an abuse of discretion standard. See In re: Grand Jury Proceedings (Howald), 877 F.2d at 850; see also Simkin, 715 F.2d at 38 (In determining whether a civil contempt sanction has lost its coercive effect, a district judge has virtually unreviewable discretion).

Weiss maintains that the time he has spent in prison is proof that he cannot comply. The district court rejected this argument finding:

> The mere fact that Weiss has spent

> some time in prison does not necessarily prove that Weiss has been telling the truth all along and cannot, at this juncture, make restitution. To the contrary, it is far more plausible under the circumstances of this case that Weiss's refusal to pay means simply that Weiss deems the detriments of incarceration outweighed by the concomitant benefits of holding onto his ill-gotten Wellington monies.

(2d Supp.R. at 2-3) We agree. Prison time, in and of itself, will not satisfy Weiss's burden of proving that there exists no "realistic possibility" that he can comply with the court's contempt order. While each passing

month of incarceration may strengthen Weiss's claim of inability, see U.S. ex rel Thom v. Jenkins, 760 F.2d 736, 740 (7th Cir.1985) (It can be assumed that at a certain point any man will come to value his liberty more than the amount of money the order requires him to pay) and the pride lost in admitting that he has lied,") many months or perhaps even several years may pass before it becomes necessary to conclude that incarceration will no longer serve the purpose of the civil contempt order. Id. There was no abuse of discretion in denying Weiss's motion to terminate the contempt order.

III.

For the foregoing reasons we AFFIRM the district court's March 14, 1990 order of civil

contempt and its July 24, 1990 order denying Weiss's motion to terminate civil contempt.

APPENDIX "B"

COMMODITY FUTURE TRADING COMMISSION AND THE STATE OF FLORIDA, Plaintiffs vs. WELLINGTON PRECIOUS METALS, INC., WELLINGTON INTERNATIONAL, INC., D. WEISS & ASSOCIATES, INC., DANIEL WEISS, and JOEL RUTENBERG, Defendants.

ORDER DENYING MOTION TO TERMINATE ORDER OF CONTEMPT

THIS CAUSE is before the Court on Defendant, Daniel Weiss's Motion to Terminate this Court's Order granting the Plaintiffs' Motion for Civil Contempt (March 14, 1990) (the "Contempt Order"). The Court has

received and reviewed the motion and the responsive memoranda. Now, upon consideration, it is

ORDERED AND ADJUDGED that the motion is DENIED, without prejudice.

A.

The facts relevant to the present motion can be briefly stated. Pursuant to the terms of the Contempt Order, Weiss was ordered to pay 5% of the Final Judgment (entered October 21, 1988) within a prescribed period of time. The Contempt Order provided that if Weiss failed to comply within the prescribed period, he would be incarcerated. Weiss was granted a one month extension of time within which to comply, but he ultimately failed to comply with the extended deadline. Weiss was]

therefore incarcerated on April 23, 1990. Since that time, Weiss has not made any further payments against the Final Judgment and has not satisfied 5% of that Judgment. Weiss therefore remains in custody.

B.

In his last motion, Weiss seeks his release on the ground that he is financially unable to pay over 5% of the Final Judgment, as required by the Contempt Order.[1] Although he appears to realize that this contention has

---

[1]Weiss never took an appeal from the Findings of Fact and Conclusions of Law (entered July 18, 1988) or from the Final Judgment. Thus, after the time within which a defeated litigant must take an appeal expired, Weiss relinquished his ability to challenge the finding that he reaped a profit of $2,883,107.00 from his illicit Wellington activities. See Contempt Order, at 3-5 (discussing principles of collateral estoppel).

already been advanced and rejected, see Contempt Order, at 8-11 (rejecting claim of financial inability), Weiss maintains that although the court did not believe him the first time he protested that he was broke, the court should, given the fact of his incarceration, believe him now; as Weiss himself puts it, [s]urely, if the [d]efendant was holding back money, 'the shadow of the prison gates' would have revealed some large sum as it did in co-defendant Rutenberg's situation." Motion, at 5. Weiss therefore argues that the Court should re-evaluate its negative assessment of Weiss's credibility, deem credible his protestations of complete poverty, and release him from prison.

The Court rejects this line of reasoning.

The mere fact that Weiss has spent some time in prison does not necessarily prove that Weiss has been telling the truth all along and cannot, at this juncture, make restitution. To the contrary, it is far more plausible under the circumstances of this case that Weiss's refusal to pay means simply that Weiss deems the detriments of incarceration outweighed by the concomitant benefits of holding onto his ill-gotten Wellington monies. This court firmly believes that as the days slip by, Weiss will reassess the foregoing cost-benefit balance and determine that it would be in his best interests to come forward with the money and end his incarceration. The court is therefore satisfied, after a careful review of this entire case, that "the coercive

sanction might yet produce its intended result." Simkin v. United States, 715 F.2d 34, 37 (2d Cir. 1983). The court therefore declines to terminate the requirements imposed by the Contempt Order.

If Weiss wants to be released from prison, he will have to take concrete steps to satisfy his obligations. Specifically, he will have to pay over 5% of the Final Judgment or he will have to propose to the court and then implement an equally-acceptable alternative. Weiss will not, however, be permitted to secure his release through promises, meritless arguments, and other verbal representations.

DONE AND ORDERED at Miami, Florida, this 20th day of July, 1990.

s/ C. Clyde Atkins
SENIOR U.S. DISTRICT
COURT JUDGE

cc: Counsel of Record

Supreme Court, U.S.
FILED
JUL 23 1992
OFFICE OF THE CLERK

No. 91-1866

In the Supreme Court of the United States

OCTOBER TERM, 1992

DANIEL WEISS, PETITIONER

v.

COMMODITY FUTURES TRADING COMMISSION AND THE STATE OF FLORIDA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE COMMODITY FUTURES TRADING COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below erred in finding that petitioner's imprisonment for civil contempt had not lost its coercive effect after petitioner's first three months of imprisonment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 950 F.2d 1525. The opinions and orders of the district court (Pet. App. B1-B7; C.A. Rec. 41-55) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 14, 1992. A petition for rehearing was denied on February 20, 1992. The petition for a writ of certiorari was filed on May 18, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, together with another individual and various corporations controlled by them—Wellington Precious Metals, Inc., Wellington International, Inc., and D. Weiss & Associates, Inc. (collectively Wellington)—conducted a so-called "Deposit Program" scheme pursuant to which they offered to the general public the opportunity to purchase specific amounts of precious metal (usually silver) at a price fixed when the contract was executed. Approximately 2,100 to 2,200 customers entered into these contracts; most, if not all, received little or no return on their investments. Gov't C.A. Br. 6. The Deposit Program was, in essence, a fraudulent "boiler room" operation, and petitioner siphoned off large sums of money from Wellington before the fraudulent scheme was uncovered. Pet. App. A1-A3.

On November 14, 1985, respondents brought suit against petitioner and others in the United States District Court for the Southern District of Florida, alleging that the defendants were engaging in the offer and sale of illegal off-exchange futures contracts in violation of Section 4(a) of the Commodity Exchange Act, 7 U.S.C. 6(a), and were defrauding the public in violation of Section 4b(A) of the Act, 7 U.S.C. 6b(A). Violations of Florida securities laws were also alleged. The complaint sought, *inter alia*, injunctive relief, a freeze of the defendants' assets, appointment of a receiver, and equitable relief in the form of disgorgement, rescission, and restitution. Gov't C.A. Br. 5-6.

2. On July 15, 1988, the district court ruled in favor of respondents. The court found that the Deposit Program contracts were illegal futures contracts in violation of Section 4(a) of the Act, and that petitioner and the other defendants had violated Section 4b(A) of

the Act in connection with the offering of Deposit Program contracts by conveying unrealistic profit predictions to customers, portraying the contracts as nearly risk free, and overstating Wellington's years in business. Petitioner was found culpable both in his individual capacity and as a principal of Wellington. Gov't C.A. Br. 6-7.

On October 21, 1988, the district court entered a final judgment which imposed a permanent injunction upon petitioner and the other defendants and ordered ancillary equitable relief, including appointment of a permanent receiver. Additionally, the court ordered petitioner to disgorge not less than $2,883,107 to the receiver within ten days. Pet. App. A2-A3; C.A. Rec. 18-24. Petitioner took no appeal from those rulings. Pet. App. A3.

3. Petitioner failed to satisfy the disgorgement order, and respondents asked that he be held in contempt. Pet. App. A3-A4. At the contempt hearing, petitioner conceded that he had failed to comply with the disgorgement order, but argued that his failure should be excused on the basis of financial inability. *Id.* at A4.

To support his claim that he no longer possessed any funds taken from Wellington (or any assets purchased with Wellington funds), petitioner testified that he had invested large sums in businesses that failed, loaned money that was not repaid, and purchased assets that he no longer owned. All told, however, petitioner's testimony accounted for only $1,347,000, less than half of the total amount ordered to be disgorged. Pet. App. A4-A8. The district court rejected petitioner's testimony, finding him in civil contempt for failure to comply with the disgorgement order. The court ordered him to pay over to the receiver five percent of the amount due under the

final judgment, or $144,155.35. *Id.* at A8; C.A. Rec. 48-51, 53-55. When petitioner failed to comply with that order, he was incarcerated on April 24, 1990. Pet. App. A9.

4. On June 11, 1990, petitioner filed a motion in the district court to terminate the contempt order. On July 20, 1990, approximately three months after petitioner was incarcerated, the court denied that motion. Pet. App. B1-B7. The court explained that petitioner's failure to comply with the disgorgement order after spending some time in prison did not necessarily prove that he would not comply in the future. Instead, the court found that "it is far more plausible under the circumstances of this case that [petitioner's] refusal to pay means simply that [petitioner] deems the detriments of incarceration outweighed by the concomitant benefits of holding onto his ill-gotten Wellington monies." *Id.* at B5. The court further stated that, "as the days slip by, [petitioner] will reassess the foregoing cost-benefit balance and determine that it would be in his best interests to come forward with the money and end his incarceration." *Ibid.* Accordingly, the court concluded that "the coercive sanction might yet produce its intended result." *Id.* at B5-B6 (quoting *Simkin* v. *United States*, 715 F.2d 34, 37 (2d Cir. 1983)).[1]

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[1] Petitioner has continued to pursue termination of the contempt order in proceedings beyond the scope of the orders for which review is sought in this Court. On August 20, 1991, he filed a second motion to terminate the order of civil contempt. The district court denied that motion on October 23, 1991. Petitioner then filed a notice of appeal of that order on November 19, 1991; that appeal is now pending before the Eleventh Circuit. Moreover, on January 10, 1992, petitioner renewed his August 1991 motion to terminate contempt with the district court. That motion was denied on July 6, 1992.

5. The court of appeals affirmed. Pet. App. A1-A16. The court upheld the district court's determination that the civil contempt order had not lost its coercive effect, agreeing that "[p]rison time, in and of itself, will not satisfy [petitioner's] burden of proving that there exists no 'realistic possibility' that he can comply with the court's contempt order." *Id.* at A14. Acknowledging that "each passing month of incarceration may strengthen [petitioner's] claim of inability," the court concluded that "many months or perhaps even several years may pass before it becomes necessary to conclude that incarceration will no longer serve the purpose of the civil contempt order." *Id.* at A14-A15. Accordingly, the court held that the district court had not abused its discretion in issuing its July 1990 order refusing to terminate petitioner's commitment for civil contempt.[2]

ARGUMENT

1. Petitioner principally contends (Pet. 12-22) that his continued commitment for contempt from April 1990 until the present[3] has ceased to be coercive and has instead become punitive in violation of his due process rights. To the extent petitioner complains of his confinement past July 1990, however, that issue is not properly before this Court. The court of appeals'

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[2] The court also rejected petitioner's contentions that he should have been permitted to relitigate the amount of money he actually received from Wellington and that the district court erred in holding him in contempt despite his purported inability to comply with the order. *Commodity Futures Trading Comm'n* v. *Wellington Precious Metals, Inc.*, 950 F.2d 1525, 1528-1530 (11th Cir. 1992). Petitioner has not sought review of those rulings in this Court.

[3] Petitioner is also serving a concurrent state criminal sentence. Pet. 11.

decision embraces only the district court's March 14, 1990, order of civil contempt and its July 20, 1990, order denying petitioner's motion to terminate contempt, a period encompassing only the first three months of petitioner's incarceration.[4]

Accordingly, the only question properly presented in this petition is whether the court of appeals correctly affirmed the district court's July 1990 finding that petitioner's imprisonment for civil contempt had not lost its coercive effect after three months. The court of appeals' ruling on that question was clearly correct. The district court applied the proper legal standards and found as a matter of fact that further confinement was likely to " 'produce its intended result.' " Pet. App. B6. That factual finding, which was upheld by the court of appeals, does not merit further review. *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987).

2. Petitioner contends (Pet. 17-18), however, that the district court failed to make the requisite "individualized determination" that petitioner will comply with the disgorgement order if sanctions are continued. That assertion is without merit.

When confronted with a motion to terminate contempt, the trial court must make a "conscientious effort to determine whether there remains a realistic possibility that continued confinement might cause

[4] Still pending before the court of appeals is petitioner's appeal of the district court's subsequent order of October 23, 1991, denying petitioner's second motion to terminate contempt. Petitioner has not asked this Court to grant a writ of certiorari before judgment in that case, and in any event no showing has been made that the case "is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate settlement in this Court." Sup. Ct. R. 11; see 28 U.S.C. 2101(e).

the contemnor" to comply with the court's order. *Simkin* v. *United States*, 715 F.2d 34, 37 (2d Cir. 1983); see also *Maggio* v. *Zeitz*, 333 U.S. 56, 76 (1948). The contemnor, however, has the burden of showing that no such realistic possibility exists. *Simkin* v. *United States*, 715 F.2d at 37; see also *Lambert* v. *Montana*, 545 F.2d 87, 91 (9th Cir. 1976). If, after review of all the relevant evidence, the court is satisfied that the incarceration might yet produce compliance with the order, the confinement may continue. *Simkin*, 715 F.2d at 37. In this regard, a trial court has "virtually unreviewable discretion both as to the procedure [it] will use to reach [its] conclusion, and as to the merits of [its] conclusion." *Id.* at 38; see also *In re Grand Jury Proceedings (Howald)*, 877 F.2d 849, 850 (11th Cir. 1989).

The district court's July 1990 order clearly manifested the requisite "conscientious effort." At the time of the court's ruling, petitioner had been incarcerated for only three months. The district court had recently heard and then adjudged as incredible petitioner's testimony in the contempt hearing. In those circumstances, it was well within the court's discretion to conclude that petitioner's refusal to discharge his obligations meant that petitioner, at least for the moment, deemed the detriments of incarceration to be outweighed by the benefits of holding onto his ill-gotten gains. Similarly, it was reasonable for the court to predict that petitioner might still reassess his cost-benefit analysis at a later date and decide that it would be in his best interest to come forward with the money in order to end his incarceration. Pet. App. B5. The district court's fact-bound determination that continued incarceration was appropriate in the particular circumstances of this case does not merit review.

3. Finally, petitioner asserts (Pet. 22, 30) that this Court should resolve a "continued disagreement among the Circuits" as to "what factors need to be considered in deciding what to do about the fact that a period of imprisonment has thus far failed to induce compliance." Petitioner does not point to any actual disagreement among the circuits on that issue, however, and in reality there is no conflict concerning the proper application of this Court's decisions in *Maggio* v. *Zeitz*, *supra*, and *McNeil* v. *Director, Patuxent Institution*, 407 U.S. 245 (1972).[5]

Petitioner's fundamental contention appears to be that periods of confinement longer than some arbitrary benchmark should be "carefully scrutinized." Pet. 26. Petitioner cites no authority for that contention, nor does he explain what form the desired scrutiny should take. In any event, this Court's decisions already require judicial scrutiny of civil contempt orders in order to ensure compliance with due process standards. As this Court stated in *Maggio*, the contemnor cannot "be held in jail forever if he does not comply." 333 U.S. at 76; see also *United States ex rel. Thom* v. *Jenkins*, 760 F.2d 736, 740 (7th Cir. 1985) ("although incarceration for civil contempt

[5] Petitioner errs in suggesting (Pet. ix) that the decision below is somehow inconsistent with *Lambert* v. *Montana*, 545 F.2d 87 (9th Cir. 1976), and *In re Grand Jury Investigation (Braun)*, 600 F.2d 420 (3d Cir. 1979). Those cases stand merely for the proposition that "if and when it becomes manifest that continued imprisonment will not result in compliance, the confinement then becomes punitive in character and the contemnor must be released." *In re Grand Jury Investigation*, 600 F.2d at 425 n.14; see *Lambert* v. *Montana*, 545 F.2d at 90-91. That proposition was acknowledged and accepted by the courts below; petitioner simply failed to make the requisite showing that his confinement had become punitive. There is no conflict.

may continue indefinitely, it cannot last forever"). Review of a contemnor's incarceration at reasonable intervals or when requested by either party insures that the contemnor will not endure incarceration when it no longer serves its coercive purpose. *Ibid.* Petitioner is already receiving such regular review at reasonable intervals by the district court. See note 1, *supra*. Accordingly, no further review is warranted.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1992

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[6] Petitioner further argues (Pet. 24) that had he been sentenced under the federal contempt statute, 18 U.S.C. 402, he would have been freed after six months. That argument fails to recognize the fundamental difference between civil and criminal contempt. The purpose of civil contempt is to coerce obedience to lawful orders, while criminal contempt is designed solely to punish acts of disrespect and vindicate the court's authority. *Maggio*, 333 U.S. at 67-68. A civil contemnor may purge himself of contempt and obtain release from jail by complying with the court's order; he "carr[ies] the key of his prison in his own pocket." *Id.* at 68. A criminal contemnor lacks such control over his imprisonment.

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PRELIMINARY STATEMENT

References to the parties, the record and the documents contained in the Appendix to the Petition for Writ of Certiorari will follow the system of notation set forth in the Petition. Respondents' Brief will be referred to as "RB," followed by the appropriate page number.

ARGUMENT AND AUTHORITIES

The Respondents argue that the Court must ignore the fact that to date Weiss has been incarcerated for over two years. Instead, the Respondents ask this Court to pretend, for the purpose of deciding whether to grant certiorari, that time has stood still and that Weiss has spent only three months in prison since the entry of the contempt order. (RB at 5-6)

Respondents have provided no authority for their contention that the Court is required to ignore the reality of the passage of time.

Furthermore, Respondents incorrectly state that Petitioner is presently serving a concurrent State criminal sentence. (RB at 5 N.3) That sentence expired on May 24, 1992. In fact, as pointed out in the Petition, had the District Court granted Weiss' Motion to Terminate the Order of Contempt, his State sentence would have terminated earlier. (Pet. at 11)

In the opinion below, the Eleventh Circuit considered the total length of imprisonment and noted that Weiss still remained incarcerated as of the date that the decision was rendered on his appeal,

January 14, 1992. (App. A-9-10) There is nothing in the Eleventh Circuit opinion to indicate that this factual finding was merely gratuitous or that appellate review had been limited to a determination of the coercive effect of only the first three months of Weiss' imprisonment. Respondents do not challenge the Eleventh Circuit's authority to consider the purpose and effect of the actual length of incarceration, but they now argue that this Court cannot review the stated basis for the Eleventh Circuit's decision and use that same factual basis for its decision.

This Court has always held that if it is necessary for the purposes of justice, any change in the facts or the

law that has occurred since the judgment under review was entered should be considered. In Patterson v. Alabama, 294 U.S. 600, 607, 55 S.Ct. 575, 578, 79 L.Ed.2d 1082, ____ (1935), this Court stated:

> We have frequently held that in the exercise of our appellate jurisdiction we have the power not only to correct error in the judgment under review, but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change in fact or in law, which has supervened since the judgment was entered.

In Ashcroft v. Tennessee, 322 U.S. 143, 156, 64 S.Ct. 921, 927, 88 L.Ed.2d 1192, ____ (1944), this Court repeated its earlier holding that new factual or legal developments should be considered:

> In disposing of cases before us it is our responsibility to make such disposition as justice may require. "And in determining what justice does require, the Court is bound to consider any change in fact or in law, which has supervened since the judgment was entered."

Id., quoting, Patterson, 294 U.S. at 607. These cases show that the Court does not need to close its eyes to the fact that Weiss is still in jail and what is really being appealed is not a three month sentence, but a term of imprisonment for which there is currently no end in sight.

Further, this Court has previously considered the total time that a contemnor has been imprisoned, from the date of his initial incarceration to the date of this Court's decision on his petition. In McNeil v. Director,

Patuxent Institution, 407 U.S. 245, 92 S.Ct. 2083, 32 L.Ed.2d 719 (1972), this Court repeatedly noted that the contemnor remained incarcerated at the time the decision was rendered. Id. at 246, 252, 92 S.Ct. at 2085, 2088. The Respondents have not offered any authority or any reason to support its position that this Court should now reject the manner of "determining what justice does require" that it has consistently followed for decades in the above-cited line of cases.

The Respondents' Brief does correctly point out that Weiss has not brought the issue of the denial of his two subsequent Renewed Motions to Terminate Order of Civil Contempt under the jurisdiction of this Court by strictly complying with Rule 11, Supreme

Court Rules.[1] It is interesting to note, however, that while the Respondents urge the Court to ignore the fact that the Renewed Motions have been filed and denied, they repeatedly refer to the Renewed Motions in their Brief and argue that the possibility of filing further renewed motions, which may eventually be granted at some indeterminate point in the future, affords Weiss an adequate remedy. (RB at 4 n.1, 5)

But the failure to invoke Rule 11 does not bar this Court's consideration of the subsequent related motions. In Roe v. Wade, 410 U.S. 113, 123, 93 S.Ct.

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[1] Weiss' second Motion to Terminate was denied on October 23, 1991. His Renewed Motion was denied on July 6, 1992, after Weiss had already filed his Petition for Writ of Certiorari.

705, 711-712, 35 L.Ed.2d 147, ___ (1973), this Court held that the failure to comply with Rule 11 will not bar review of related, but separate, actions. In Roe, a companion declaratory relief action was still at the Circuit Court level at the time that the petition for writ of certiorari was filed before this Court. The Roe Court held that while it may have been better procedure to include the declaratory relief action in the petition for certiorari by invoking Rule 20 [the former version of Rule 11], the Court would not be foreclosed from considering both cases, since one action was properly before the Court and the arguments and issues were the same in both cases. Id. at 123, S.Ct. at 711-712.

Under Roe, the Court should consider the denial of the two Renewed Motions to Terminate even though Weiss did not strictly comply with Rule 11. To require Weiss to remain in jail pending separate reviews of his Renewed Motions would serve no purpose and would simply delay full consideration of his case. As this Court stated in Roe:

> It would be destructive of time and energy for all concerned were we to rule otherwise.

Id. at 123, 93 S.Ct. at 712. As in Roe, there is no reason to require Weiss to file, or to require this Court to rule upon, multiple petitions for certiorari where the factual and legal issues are identical and the only new matter raised in the subsequent motions is the

inevitable and predictable passage of time.

The sole remaining argument advanced by the Respondents as a basis for the denial of Weiss' Petition is their contention that the level of judicial scrutiny afforded to Weiss by the Eleventh Circuit, "virtually unreviewable discretion," is sufficient to protect a contemnor's due process rights regardless of the length of the detention. (RB at 7-8) The position urged by the Respondents would constitute a complete rejection of this Court's long standing recognition that coerciveness is inversely proportionate to duration, a guiding principle that this Court and the Circuit Courts have consistently followed since it was first set forth in Maggio v.

Zeitz, 333 U.S. 56, 68 S.Ct. 401, 92 L.Ed.2d 476 (1948). The denial of Weiss' Petition for Writ of Certiorari on this basis, the Respondents' only remaining argument, would require that this Court reject over fifty-seven years worth of legal precedent. Since the Respondents have failed to provide this Court with any reason to adopt such a radical departure from its earlier decisions, either based upon fact or upon law, Weiss urges that certiorari review is necessary to bring the Eleventh Circuit's decision into conformity with those of this Court and the other Circuit Courts that have considered this issue, to preserve Weiss' due process right to be free from punitive incarceration for

civil contempt and to provide guidance in future cases.

CONCLUSION

WHEREFORE, Petitioner DANIEL WEISS respectfully requests that this Honorable Court grant his Petition for Writ of Certiorari and review the both the standards used in reaching the decision on his Motion to Terminate, reverse the decision denying his Motion, and order the termination of the sanctions imposed by the District Court.

Respectfully submitted,

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and

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Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by U.S. Mail to Kenneth W. Starr, Solicitor General, Department of Justice, Washington, D.C. 20530; Gary L. Printy, Assistant General Counsel, Department of Banking and Finance, The Legal Section, Suite 1302, The Capitol Building, Tallahassee, FL 32399-0350; Victor L. Reid, Esq., Office of the General Counsel and Dennis O'Keefe, Esq., Commodity Futures Trading Commission, 2033 "K" Street, N.W., Washington, D.C. 20581, this 19 day of August, 1992.

MARC S. NURIK
Attorney for Petitioner